

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

JOSEPH ELLERBE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 02-1554-SLR
	)	
THOMAS L. CARROLL,	)	
Warden, and ATTORNEY	)	
GENERAL OF THE STATE	)	
OF DELAWARE,	)	
	)	
Respondents.	)	

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Joseph Ellerbe, pro se petitioner.

Thomas E. Brown, Deputy Attorney General, Delaware Department of Justice, Wilmington, Delaware. Counsel for respondents.

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**MEMORANDUM OPINION**

March 19, 2004  
Wilmington, Delaware

**ROBINSON**, Chief Judge

## **I. INTRODUCTION**

Petitioner Joseph Ellerbe is a Delaware inmate in custody at the Delaware Correctional Center in Smyrna, Delaware. Currently before the court is petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2) For the reasons that follow, the court concludes that petitioner's application is time-barred by the one-year period of limitation prescribed in 28 U.S.C. § 2244(d)(1). Accordingly, the court will dismiss the petition as untimely.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

In 1999, petitioner was indicted on charges of attempted first degree unlawful sexual intercourse, second degree kidnapping, possession of a deadly weapon during the commission of a felony, and possession of a deadly weapon by a person prohibited. A Delaware Superior Court jury was unable to reach a verdict on the charge of attempted first degree sexual intercourse, but they convicted petitioner on the remaining three charges. Petitioner was sentenced to a total of 25 years imprisonment, suspended after 14 ½ years for probation. The Superior Court also directed that petitioner be classified as a Tier 2 sexual offender pursuant to 11 Del. C. Ann. §§ 4120, 4121, and 4336. See Ellerbe v. State, 755 A.2d 387 (Del. 2000).

Petitioner appealed his conviction, alleging: (1) the

sentence was excessive and reflective of a "closed mind"; and (2) as a matter of law, the charges on which he was convicted could not authorize the court to require registration as a sex offender. Id. On May 11, 2000, the Delaware Supreme Court affirmed petitioner's conviction and sentence, but vacated the Superior Court's designation of petitioner as a sex offender. Id.

On August 3, 2001, petitioner filed a motion for state post-conviction relief in the Delaware Superior Court, asserting: (1) bias and/or prejudice on the part of the trial judge; (2) insufficient evidence to support his conviction; and (3) improper jury instructions. See State v. Ellerbe, ID#9804013614, Order (Del. Super. Sept. 10, 2001). On September 10, 2001, the Superior Court denied the motion as procedurally defaulted under Superior Court Criminal Rules 61(i)(3) and (4). Id. The Delaware Supreme Court affirmed this decision on post-conviction appeal. Ellerbe v. State, 790 A.2d 475 (Del. 2002).

Petitioner, acting pro se, filed the pending application for federal habeas relief on September 27, 2002. (D.I 2) Petitioner alleges: (1) the indictment was "multiplicitous" because the weapon offense is part of the first degree attempted unlawful sexual intercourse offense as well as its own separate offense of possession of a deadly weapon during the commission of a felony; (2) the State did not prove the second degree kidnapping charge

beyond a reasonable doubt; (3) the trial court imposed an illegal sentence because he was not given the opportunity to present any information to mitigate the sentence; and (4) his public defender provided ineffective assistance of counsel by failing to challenge the hung jury verdict. (D.I. 2.)

Respondents contend that the entire petition is time-barred and ask the court to dismiss the petition as untimely. They also contend that claim one is exhausted but procedurally barred, and that the remaining claims are procedurally barred for failure to satisfy the cause-and-prejudice exception for procedurally defaulted claims.<sup>1</sup> (D.I. 8)

Petitioner's habeas petition is now ripe for review.

### **III. DISCUSSION**

#### **A. One-Year Statute of Limitation**

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") prescribes a one-year period of limitation for the filing of habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). The one-year limitation period begins to run from the latest of:

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<sup>1</sup>Although the court agrees that the claims are procedurally defaulted, the court focuses only on the time-bar issue. Either of the procedural requirements is dispositive under AEDPA. See Sweger v. Chesney, 294 F.3d 506, 518-19 (3d Cir. 2002) ("the statute of limitations . . . and the exhaustion doctrine . . . impose entirely distinct requirements on petitioners; both must be satisfied before a federal court may consider the merits of a petition").

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d) (1).

Petitioner does not allege, nor can the court discern, any facts triggering the application of § 2244(d) (1) (B), (C), or (D). As such, the one-year period of limitation began to run when petitioner's conviction became final under § 2244(d) (1) (A).

If a state prisoner appeals a state court judgment but does not seek certiorari review, the judgment of conviction becomes final, and the one-year period begins to run, upon expiration of the ninety-day time period allowed for seeking certiorari review.

See Kapral v. United States, 166 F.3d 565, 575, 578 (3d Cir. 1999); Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

In the present case, the Delaware Supreme Court affirmed petitioner's conviction and sentence on May 11, 2000. Ellerbe v. State, 755 A.2d 387 (Del. 2000). Because petitioner did not apply for certiorari review, his conviction became final on

August 9, 2000. See Kapral, 166 F.3d at 575, 578 (3d Cir. 1999). Accordingly, to comply with the one-year limitations period, petitioner had to file his § 2254 petition by August 9, 2001.

Petitioner's § 2254 petition was filed on September 27, 2002, but it is dated September 20, 2002. (D.I. 2) The court presumes that petitioner delivered the petition to prison officials for mailing on September 20, 2002, the date noted on the petition. See, e.g., Gholdson v. Snyder, Civ. Act. No. 00-051-SLR, 2001 WL 657722, at \*2 n.1 (D. Del. May 9, 2001). Because a pro se prisoner's habeas petition is deemed filed on the date he delivers it to prison officials for mailing to the district court, the court adopts September 20, 2002 as the filing date. See Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998); Woods v. Kearney, 215 F. Supp. 2d 458, 460 (D. Del. 2002). Thus, the court concludes that petitioner's habeas petition is time-barred and should be dismissed, unless the time period can be statutorily or equitably tolled. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999). The court will discuss each doctrine in turn.

#### **B. Statutory Tolling**

Section 2244(d)(2) of the AEDPA specifically permits the statutory tolling of the one-year period of limitations:

The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending should not be counted toward any period of limitation under this

subsection.

28 U.S.C. § 2244(d)(2). The Third Circuit views a properly filed application for State post-conviction review as "one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). However, even if a state post-conviction motion is properly filed under state procedural rules, it will not toll or revive the federal habeas limitations period if the § 2254 petition itself is not filed within the federal one-year filing period. See Price v. Taylor, 2002 WL 31107363, at \*2 (D. Del. Sept. 23, 2002).

Here, petitioner properly filed his motion for state post-conviction relief on August 3, 2001, and the Superior Court denied the post-conviction motion on January 30, 2002. As such, the limitations period was tolled during this period of time. See 28 U.S.C. § 2244(d)(1)(A). However, when petitioner filed his state post-conviction motion on August 3, 2001, 359 days of the federal habeas limitations period had already passed. When the habeas limitations period started again on January 30, 2002, petitioner had to file his habeas petition by February 5, 2002 to be timely. The September 20, 2002 filing date was too late. Thus, petitioner's habeas petition is time-barred unless the one-year time period is equitably tolled. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

### **C. Equitable Tolling**

A court may, in its discretion, equitably toll the one-year filing period when "the petitioner has in some extraordinary way . . . been prevented from asserting his or her rights." Miller v. New Jersey State Dep't of Corrs., 145 F.3d 616 (3d Cir. 1998) (internal citations omitted). In general, federal courts invoke the doctrine of equitable tolling "only sparingly." See United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998). The Third Circuit permits equitable tolling for habeas petitions in only four narrow circumstances:

- (1) where the defendant actively misled the plaintiff;
- (2) where the plaintiff was in some extraordinary way prevented from asserting his rights;
- (3) where the plaintiff timely asserted his rights mistakenly in the wrong forum; or
- (4) where [in a Title VII action] the claimant received inadequate notice of his right to file suit, a motion for appointment of counsel is pending, or the court misled the plaintiff into believing that he had done everything required of him.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). Generally, "a statute of limitations should be tolled only in the rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice." Id. (quoting Midgley, 142 F.3d at 179).

In order to trigger equitable tolling, the petitioner must demonstrate that he "exercised reasonable diligence in investigating and bringing [the] claims"; mere excusable neglect is insufficient. Miller, 145 F.3d at 618-19 (citations omitted).



For example, in non-capital cases, inadequate research, attorney error, miscalculation, or other mistakes do not qualify as "extraordinary circumstances" sufficient to trigger equitable tolling. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001).

In the instant case, petitioner has failed to articulate any extraordinary circumstances that prevented him from filing his petition with this court in a timely manner. The court has independently reviewed the record and can discern no extraordinary circumstances that warrant equitable tolling. To the extent petitioner made a mistake or miscalculation regarding the one-year filing period, such mistakes do not warrant the equitable tolling of the limitations period. See Simpson v. Snyder, Civ. Act. No. 00-737-GMS, 2002 WL 1000094, at \*3 (D. Del. May 14, 2002). Accordingly, the court concludes that the doctrine of equitable tolling is not available to petitioner on the facts he has presented and, therefore, petitioner's § 2254 petition will be dismissed as untimely.

#### **IV. CERTIFICATE OF APPEALABILITY**

Finally, the court must decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability may only be issued when a petitioner makes a "substantial showing of the denial of a constitutional right" by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional

claims debatable or wrong.” 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

When a federal court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, the court is not required to issue a certificate of appealability unless the petitioner demonstrates that jurists of reason would find it debatable: (1) whether the petition states a valid claim of the denial of a constitutional right; and (2) whether the court was correct in its procedural ruling. Id. “Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further.” Id.

The court concludes that petitioner’s habeas petition must be dismissed as untimely. Reasonable jurists would not find this conclusion to be unreasonable. Consequently, the court declines to issue a certificate of appealability.

## **V. CONCLUSION**

For the reasons stated, petitioner’s application for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate order shall issue.

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Warden, and ATTORNEY	)	
GENERAL OF THE STATE	)	
OF DELAWARE,	)	
	)	
Respondents.	)	

**ORDER**

At Wilmington, this 19<sup>th</sup> day of March, 2004, consistent with the memorandum opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Joseph Ellerbe's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 2) is DISMISSED, and the relief requested therein is DENIED.

2. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Sue L. Robinson  
United States District Judge